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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 790.

MARY CABALIK, Petitioner,

v.

JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company, Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

PRELIMINARY STATEMENT.

The purpose of this brief is to refute the argument urged by the Respondent that since the relationship between the stockholders and public is contractual in its nature, it is protected by the contract clause of the Federal Constitution.

II.

ARGUMENT.

Since the Assessment Is a Quasi Contractual Obligation Which Had Not Vested Prior to the Passage of the Act of 1923, Is the Relationship Protected by Article I, Section 10, of the Constitution of the United States?

The position of the Petitioner is that the liability of the stockholders of this corporation is *quasi* contractual, that the relationship had not vested when the Act of 1923, P. L. 173 was enacted by the legislature, (the passage of which act prevented enforcement of the assessment provisions of Section 5 of the Act of 1876 because of the prohibitions contained in Section 1 of the XIV Amendment to the Constitution of the United States) and that a *quasi* contractual relationship is not protected by the contract clause of the Federal Constitution, which protects only true agreements.

(a) *The assessment against stockholders of a corporation is a quasi contractual obligation.*

The Supreme Court of the United States has so held in the following decisions:

Mr. Justice Cardozo delivered the opinion in *Chisholm v. Gilmer*, 299 U. S. 99; 81 L. ed. 63 (1936). This was an action by the Receiver of a national bank to recover an assessment levied against a stockholder of the bank for double liability. At page 102 the Court states the relationship to be *quasi* contractual:

> "It is here sought to be applied, not in equity or admiralty (citing cases), but in a common law cause, a quasi-contractual obligation being the source of liability."

Coombes v. Getz, 285 U. S. 434; 76 L. ed. 866 (1931) was an action brought by the Receiver of a corporation to recover a liability by statute imposed upon directors. In a dissenting opinion Mr. Justice Cardozo defined the relationship as *quasi*-contractual. At page 449 he states:

> "If we put aside deceptive labels, borrowed from the law of quasi-contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (Crane v. Hahlo, 258 U. S. 142, 146, 66 L. ed. 514, 517, 42 S. Ct. 214), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors (compare Christopher v. Norvell, 201 U. S. 216, 225, 50 L. ed. 732, 736, 26 S. Ct. 502, 5 Ann. Cas. 740; Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. ed. 1163, 1174, 27 S. Ct. 755)."

(b) *The quasi contractual relationship had not vested when the Act of 1923, P. L. 173 was enacted.*

The right was contingent until the Secretary of Banking closed the bank and exercised his discretionary privilege of making the assessment on February 1, 1939 (Record 9 a). Moreover, nowhere in the record is it stated that any of the depositors of the bank at the time of its closing were depositors or creditors in 1923.

The discretionary right to assess and to sue is granted to the Secretary of Banking of the Commonwealth of Pennsylvania as Receiver by the express provisions of Section 723 of the Department of Banking Code of 1933; 1933 P. L. 565; 71 P. S. pocket parts, Section 733-723 at page 130. The Secretary of Banking as Receiver took possession of the Pittsburgh-American Bank & Trust Company on September 25, 1931 (Record 8 a). However, similar discretionary authority was

vested in the Secretary of Banking by the Banking Act of 1923, P. L. 809 at P. L. 826, Section 37.

It has been settled under a long line of cases that creditors of national banks have no right to sue. They must seek their remedy through the comptroller; they cannot proceed directly in their own names against stockholders of banks.

In *Kennedy v. Gibson, et al.,* 75 U. S. 498, page 505 (1869), it is stated:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected.
>
> "These questions are referred to his judgment and discretion, and his determination is conclusive."

At page 506:

> "* * * creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

The above seems to be a leading case and is cited and approved and the following language used in *Broderick v. Rosner,* 294 U. S. 629; 79 L. ed. 1100 (1934), at page 647 where it is stated:

> "* * * it has been settled by an unbroken line of authorities beginning with Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. ed. 476, 478, that the Comptroller's determination is conclusive in an action at law to enforce the stockholder's liability; being subject, like other administrative orders, only to a direct attack for fraud or error of law by appropriate proceedings in equity."

It is respectfully submitted that the same reasoning which applies to the Comptroller under the National Banking Act applies with equal force to the Secretary of Banking of Pennsylvania. The creditors of a closed Pennsylvania bank have no right to sue a stockholder directly; the right to sue is in the Secretary of Banking and that right is not mandatory but discretionary, and by reason thereof creditors have no vested rights in Pennsylvania against stockholders of closed banks.

The Act of 1923, P. L. 809, Section 37, at P. L. 826, reads as follows:

> "Section 37. Enforcement of Individual Liability of Stockholders.—Whenever the stockholders of a corporation whereof the secretary shall have taken possession are liable, in addition to their liability as such stockholders for unpaid subscriptions, to an amount equal to the par value of their stockholdings in such corporation, and the secretary has determined from his examination of the affairs of the corporation that the reasonable value of its assets is not sufficient to pay its creditors in full, he *may enforce* the individual liability of such stockholders to such extent as may be necessary.
>
> "If *he determines to enforce such liability,* he shall make demand, * * *" (Italics supplied).

Therefore, the quasi contractual obligation in the case at bar was not a vested right. It will be noted that Respondent cites only cases where the right had vested.

(c) *Article I, Section 10, Clause 1 of the Constitution of the United States protects only true agreements and not contingent quasi contractual relationships.*

That portion of the Federal Constitution pertaining to the impairment of contracts which appears in Article I, Section 10, Clause 1 of the Federal Constitution, U. S. C. A. part 2, page 4 and page 31 is as follows:

> "No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or law impairing the Obligation of Contracts or grant any Title of Nobility."

Mr. Justice Cardozo in a portion of his dissenting opinion in *Coombes v. Getz, supra,* which portion of the opinion is not at variance with the majority opinion, clearly states and supports by the citation of cases the legal provision that the contract clause of the Federal Constitution is aimed at true agreements and not at quasi-contracts as distinguished from agreements implied in fact unless the quasi contract has become a vested right. At page 450 we find:

> "The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact (Crane v. Hahlo, 258 U. S. 142, 146, 66 L. ed. 514, 517, 42 S. Ct. 214; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 288, 27 L. ed. 936, 937, 3 S. Ct. 211)."

Since the relationship in the present case is quasi-contractual and was contingent in 1923, it is not protected by the contract clause of the constitution.

Respectfully submitted,

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